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IN THE COURT OF APPEALS OF INDIANA

CHARLES HARTSELL, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0612-CR-583
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0501-FB-9

June 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Charles Hartsell, Jr. appeals the eight-year sentence and order of restitution imposed following his plea of guilty to Class C felony burglary. We affirm in part and reverse in part.

Issues

The issues before us are:

I. whether Hartsell's eight-year sentence is inappropriate; and

II. whether the trial court properly ordered restitution.

Facts

On two occasions, November 2 and November 8, 2004, Hartsell entered through a closed door of a community gospel church located in St. Joseph County with the intent to commit theft. On January 27, 2005, the State filed charges against Hartsell: two counts of burglary, both Class B felonies, and an habitual offender allegation. Prior to his sentencing, Hartsell assisted state authorities by testifying against one other defendant and providing law enforcement officers with information to apprehend other suspected criminals. Pursuant to a plea agreement, Hartsell pled guilty to Class C felony burglary, a lesser charge based solely on the November 8, 2005 incident. The State agreed to dismiss all charges related to the November 2, 2005 incident and the habitual offender charge. The plea agreement provided that sentencing on the remaining count would be left to the discretion of the trial court.

At the time of sentencing, it was disclosed that Hartsell had a total of eight felony convictions, a pending criminal matter in Marshall County, and was on parole at the time

of the November 8, 2005 matter. Hartsell's fifteen-year criminal history includes two counts of Class B felony burglary, Class C felony burglary, Class D felony resisting law enforcement, theft, and check deception. On January 11, 2006, the trial court sentenced Hartsell to eight years for the Class C felony burglary, imposed a fine of $250.00, and ordered restitution in the amount of $1,331.99. Hartsell now appeals the eight-year sentence and the order of restitution.

Analysis

I. Appropriateness of Sentence

Hartsell contends the trial court erroneously failed to consider relevant mitigating factors and that his sentence is inappropriate. Because Hartsell's challenge is purely a state law-based one, the first step is to determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reasons why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances. Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied. If we find that the trial court's sentencing decision is improper we may exercise several options: we may remand to the trial court for clarification or a new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Id. at 718.

Moreover, Indiana Appellate Rule 7(B) provides for the revision of a sentence that is inappropriate in light of the nature of the offense and the character of the offender. Id.[1]

Hartsell first argues that the trial court did not give sufficient mitigating weight to his cooperation with the State. Instead, Hartsell claims, the trial court "assumed" his cooperation was factored into the plea agreement. Hartsell acknowledges the established principle that it is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Jones v. State, 705 N.E.2d 452, 455 (Ind. 1999). Importantly, a trial court is not required to give mitigating factors the same weight or credit as does the defendant. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). We observe that the trial court did properly acknowledge Hartsell's work as an informant and concluded that his efforts had already been considered in the plea negotiations. The trial court determined that Hartsell's voluntary cooperation with the State "reduced [his] exposure from fifty years down to eight years." Tr. p. 26. We conclude that the trial court's sentencing statement is adequate because it properly acknowledged Hartsell's informant work but explained why it did not give it substantial weight.

Hartsell's plea agreement left sentencing entirely within the trial court's discretion. Although the trial court's sentencing statement is adequate, we still may revise Hartsell's sentence under Appellate Rule 7(B) if we find it to be inappropriate. A

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[1] Hartsell's offenses were committed before the recent sentencing amendments of April 2005. His sentencing determination, therefore, is not governed by the substantial revision of the sentencing scheme. Walsman v. State, 855 N.E.2d 645, 649-53 (Ind. Ct. App. 2006).

sentence may be revised if, "after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Guillen v. State, 829 N.E.2d 142, 149 (Ind. Ct. App. 2005), trans. denied. Applying this standard, sentences may be revised when specific broad conditions are met. Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). In this case, these conditions have not been satisfied.

Neither the nature of the offense nor Hartsell's character warrants a revised sentence. Here, Hartsell was caught in the act of burglarizing a church. A review of Hartsell's character reveals an extensive fifteen-year criminal history consisting of multiple felony convictions. Moreover, Hartsell has failed to demonstrate an ability to bring his behavior within the contours of the law for any sustained period of time. This is evidenced by the multitude of felony convictions and an on-going struggle with drug addiction. We find this criminal history particularly persuasive and conclude that Hartsell's sentence is not inappropriate.

II. Order of Restitution

Hartsell also contends the trial court erroneously ordered him to pay restitution. Initially, the State claims that Hartsell has waived his restitution argument because he failed to object to the restitution order at trial. In support, the State relies on Vanness v. State, 605 N.E.2d 777, 783 (Ind. Ct. App. 1992), trans denied. In Vanness, restitution was granted after hearing testimony and reviewing financial documents related to a custody dispute. Significantly, the victim filed a "detailed list at trial court of costs she incurred, and she testified as to how she incurred those expenses totaling $36,718.60."

Id. at 783. Under those facts, we determined that the evidence supported the amount of restitution awarded. Id.

In the instant case, the dispute does not concern the amount of restitution, but whether the trial court exceeded its statutory authority to order restitution at all. Because the order of restitution was granted as part of Hartsell's sentencing hearing, this matter amounts to fundamental error and may be raised for the first time on appeal. Green v. State, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004). We also note that the State neither requested restitution nor presented evidence regarding it at the sentencing hearing.

Indiana Code Section 35-50-5-3 governs restitution and provides in relevant part:

> In addition to any sentence imposed under this article for a felony or misdemeanor, the court may…order the person to make restitution to the victim of a crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of:
>
> (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate). . . .

Such an award falls within the sound discretion of the trial court and will only be reversed upon a finding of an abuse of that discretion. Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006). Under this high standard, we will only reverse an order of restitution if it is clearly against the logic and effects of the facts and circumstances before the court. Id. at 346.

Section 35-50-5-3 authorizes restitution for "property damages of the victim incurred as a result of the crime." Here, Hartsell's plea agreement mandates a guilty plea to Class C felony burglary committed on November 8, 2004. The only evidence on

record regarding expenses was to the dismissed burglary charge that occurred on November 2, 2004. Moreover, the victim only requested restitution for the value of items taken from the premises on November 2, 2004. The amount of restitution ordered must reflect the actual loss suffered by the victim. Absent any specific provisions within the plea agreement, restitution must be limited to those crimes for which a defendant has pled guilty. Green 811 N.E.2d at 879. Therefore, the trial court's order of restitution is improper as a matter of law.[2] We reverse that order.

Conclusion

The trial court's imposition of an eight-year sentence was not erroneous or inappropriate. However, the trial court erred in ordering the payment of restitution.

Affirmed in part and reversed in part.

NAJAM, J., and RILEY, J., concur.

[2] The State concedes that restitution was improper.